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Supreme Court, U.S.
FILED
SEP 2 1 2004
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No. 03-1396

In The Supreme Court of the United States

AMERICAN GI FORUM OF TEXAS, TEXAS LULAC DISTRICT 15, SIMON BALDERAS, GILBERTO Z. TORRES, ELI ROMERO,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

APPELLANTS' OPPOSITION TO MOTION TO AFFIRM

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ARGUMENT

The State of Texas strains to depict the District Court decision as resting on basic factual findings in a run-of-the-mill case under section 2 of the Voting Rights Act. In fact, the court sanctioned an unprecedented dismantling of a minority opportunity district and the trading off of Latino electoral opportunity from one portion of the state to another. Stretching to approve this extraordinary mid-decade map, the District Court contorted precedent and concocted substantial new law, as detailed in the GI Forum plaintiffs' Jurisdictional Statement. As the Jurisdictional Statement and this opposition demonstrate, summary affirmance is inappropriate in this case.

I. The Texas Plan Dismantled a Latino Opportunity District.

In adopting Plan 1151C, the court-drawn plan in effect for congressional elections in 2002, the *Balderas* court determined that CD 23 was one of six effective Latino opportunity districts. While the State and District Court majority here now claim that CD 23 was not an effective district, the *Balderas* decision belies that assertion. The court in *Balderas* held:

> . . . the Latino population is not sufficiently compact or numerous to support *another*, effective majority Latino citizenship district in Texas, in Dallas County or in South Texas . . . the failure to create *seven such* districts will not prevent full and equal Latino participation in the political process.

Balderas v. Texas, No. 6:01-CV-158, slip op. (E.D. Tex., Nov. 14, 2001), *aff'd without opinion*, 536 U.S. 919 (2002) (emphasis added), Mot. App. 12a.[1]

The highlighted language demonstrates the court's conclusion that Plan 1151C includes six "effective majority Latino citizenship district[s]." CD 23 was one of those six districts.[2] As Judge Ward notes, "[t]he *Balderas* court implicitly recognized that District 23 under Plan 1151C was a protected minority opportunity district when it maintained only six Latino majority citizen voting age districts." *Session v. Perry*, 298 F. Supp. 2d 451, 518 (E.D. Tex. 2004), J.S. App. at 130 (Ward, J.) (under both Plan 1151C and its predecessor, CD 23 "was a protected Latino opportunity district.").

Even if the conclusion of Judge Ward, a member of the *Balderas* court, does not suffice to demonstrate that CD 23 was a Latino opportunity district, the State's map changes in 2003 and the District Court's assessment of those changes reveal the same irrefutable conclusion – CD 23 was one of the six Latino opportunity congressional districts. The District Court here held that Plan 1374C, the Texas legislature's 2003 congressional plan, maintains six "effective Hispanic opportunity districts." *See Session*, 298 F. Supp. 2d at 489, J.S. App. at 70. The District Court also notes that one of these, CD 25, is a *new* Latino opportunity district. *Id.* at 489, J.S. App. at 71. Since there were six Latino opportunity districts under 1151C and six under 1374C, including a new such district, one of the six under

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[1] "Mot. App." refers to the appendix to the State's Motion to Affirm.

[2] "A review of the statistical package for Plan 1000C reveals that District 23 was one of those six districts." *Session*, 298 F. Supp. 2d at 518, J.S. App. at 130 (Ward, J.).

1151C must necessarily have been dismantled as a Latino opportunity district and replaced by CD 25. That district is CD 23. *See id.* at 488-89, J.S. App. at 68-70 (describing redrawing of CD 23 and creation of CD 25 "[t]o avoid retrogression under § 5").

No verbal legerdemain can change the historical fact that the federal court drew CD 23 in Plan 1151C as a Latino opportunity district.[3] And, while the District Court asserts that nothing has changed since the *Balderas* decision with regard to Latino opportunity districts in South Texas, the court relies heavily on one intervening occurrence – the 2002 electoral success of Henry Bonilla, who is not the choice of Latino voters – to conclude that CD 23 was actually not an opportunity district. Of course, one loss, especially compared to conclusions by all experts, including the State's own Dr. Keith Gaddie, that CD 23 elected the Latino choice in the vast majority of racially contested statewide elections, cannot convert an opportunity district into a mere influence district. *See Session*, 298 F. Supp. 2d at 518, J.S. App. at 130 (Ward, J.) (describing expert's conclusions).

In the face of the parties' unanimous demonstration that CD 23 offered Latino voters the opportunity to elect their candidate of choice, the District Court nonetheless upheld the elimination of that district. The court's decision rests on legal conclusions of significant magnitude, beginning with when it is permissible to dismantle a protected minority opportunity district.

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[3] The District Court initially hedged a bit in its conclusion as to CD 23, asserting that it "had not performed *consistently* as a Hispanic opportunity district." *Session*, 298 F. Supp. 2d at 488, J.S. App. at 67 (emphasis added).

II. Latino Origin Was the Sole Basis for Constructing the New CD 23.

How the Texas legislature accomplished its dismantling of CD 23 as a Latino opportunity district raises even more substantial questions. Of late, this Court has made increasingly clear the fact that civil rights, including rights protected by the Voting Rights Act, are individual, not group-based, rights. Yet, here the District Court held it permissible for the State to carve a new district, CD 25, in which Latino voters in one part of South Texas would have the opportunity to elect a candidate of choice, while at the same time dismantling an existing opportunity district, CD 23, by severing one of the most densely Latino cities in Texas.

Individual Latino voters that the legislature retained in CD 23 – including many in the newly-split Webb County – lost their ability to elect a candidate of choice. The Texas legislature realigned these individual voters, en masse and on the basis of race or national origin, from the Latino opportunity district of CD 23 to the reconfigured, non-opportunity district of CD 23, where their electoral preferences will be overwhelmed by court-acknowledged racially-polarized voting for all elections in the foreseeable future. On its face, this constitutes a trading off of the rights of Latino voters in CD 23 against those of the Latino voters in new CD 25, something that this Court has held is improper. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 916-17 (1996) (rejecting argument that section 2 violation in one area may be remedied by minority opportunity district anywhere else in the state). Here, the trade-off is even more repugnant because Texas obtained it on the cheap. Most of the Latino voters in CD 25 were already residing in a pre-existing Latino opportunity district, so the State

effectively compromised the rights of Latino voters in CD 23 while *not* enhancing the rights of Latino voters elsewhere in Texas.[4] The District Court's approval of this no-cost trade-off is in substantial tension with this Court's directive to treat voting rights as individual.

III. The District Court Sanctioned an Intentional Dilution of the Votes of Latinos Retained in CD 23.

The fact that the State of Texas specifically intended to dilute the vote of Latinos remaining in CD 23 further heightens the significance of the issues that the District Court's opinion raises. The State identified Latino voters as a threat to the CD 23 incumbent, Henry Bonilla, because, as the District Court found, Bonilla "had lost a larger amount of Hispanic support in each successive election," attracting only eight percent of the Latino vote in 2002. *Session*, 298 F. Supp. 2d at 488, J.S. App. at 68. The State – and the District Court – assumed that a strong identification between race and party affiliation in Texas meant that replacing Latino voters in the southern portion of the district with Anglo voters to the north would bolster Republican Bonilla's chances of longterm survival. However, the State did not measure support for Bonilla by party affiliation, but used Latino origin as a proxy for non-support of Bonilla, and then labeled its elimination of

[4] Of course, the fact that it was possible to remove so many Latino voters from an opportunity district and to craft a compensating new district while not shifting a significant number of Latino voters from non-opportunity into opportunity districts, demonstrates that it is possible to create a seventh Latino opportunity district, precisely what the GI Forum plaintiffs sought.

thousands of Latinos a "partisan" aim. In fact, however, it was Latino origin alone that the State used to construct a new, more Bonilla-friendly CD 23. Ignoring the possibility that Latino lack of support might stem from something other than party affiliation, and eschewing the notion that Bonilla, like other Texas Republicans, could increase his abysmal level of Latino support, the State followed a singular, race-based imperative – reduce Latino voting strength in CD 23.

The assumption that minority race and party affiliation coincide is ubiquitous in redistricting, yet here the District Court sanctioned the use of race as a proxy for partisan support to a much greater degree than ever before. The court permitted the state to use the race of voters as the sole basis for removal of thousands of Latino voters simply because many Latino voters had withdrawn their support for the incumbent. This decision raises a substantial issue.

Moreover, while it *removed* voters from CD 23 on the sole basis of race, the State also *retained* voters on the basis of race. As the District Court noted, the State retained enough Latino residents in CD 23 to make the district nominally, but not effectively, a Latino majority district; the new CD 23 was constructed "with the additional political nuance that Bonilla would be reelected in a district that had a majority Latino voting age population – although clearly not a majority of citizen voting age population and certainly not an effective voting majority." *Session*, 298 F. Supp. 2d at 497, J.S. App. at 85-6. Yet, this "additional political nuance" was one the map drawers plainly wanted to ensure. *See* Juris. Statement at 6-7. In effect, then, for the sake of the political symbolism of a Hispanic Republican elected out of a nominally Latino district, the State intentionally retained

thousands of Latino voters in a district where they would not have the opportunity to elect a candidate of their choice.

This race-based action in service of political symbolism[5] epitomizes intentional vote dilution: voters placed on the basis of their race in a district where they would be powerless. Yet, here, the District Court concluded that this was not unlawful vote dilution because it was accomplished in service of political symbolism. This Court has repeatedly held that the benignity of the motivation behind racial intent cannot save it from legal proscription. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228-29 (1995) ("'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification"). The District Court's decision, by thus placing the issue of racial intent in voting outside the remainder of the law, raises substantial questions that this Court should address.

IV. The District Court Bootstrapped its Proportionality Holding.

Resting its "totality of the circumstances" finding on proportionality, the District Court engaged in a bootstrapping that could, if it became prevalent, severely undermine the protections of the Voting Rights Act. First, the court relied heavily on the earlier *Balderas* decision of 2001, opining that there is "no convincing basis" to reject the conclusion that section 2 does not require a seventh Latino opportunity district. In doing so, the court ignored the additional data now available, *see Session*, 298 F. Supp. 2d at

[5] The GI Forum plaintiffs demonstrated that the State easily could have preserved Bonilla's incumbency while not diluting Latino voting strength in CD 23.

527, J.S. App. at 148-49 (Ward, J.) (availability of citizen data and recent election returns), as well as the empirical demonstration, through the State's own creation of new CD 25, that it was possible to craft another Latino opportunity district in South Texas. While the GI Forum plaintiffs have not taken a position on the permissibility of mid-decade redistricting, it is surely true that states that undertake the task should be judged under then-extant conditions. Permitting mid-decade maps to rely so heavily on judicial conclusions regarding separate maps at the opening of the decade would permit all manner of mischief and provide a strong incentive for frequent redrawing of maps.

Second, the District Court stated that plaintiffs' demonstration districts were "more unusually shaped" and that one of the demonstration districts was not effective because not sufficiently far above Latino majority citizen voting age population (CVAP). Perhaps recognizing the tenuousness of both conclusions, the former in light of compactness scores lower than districts in the plan the court approved, and the latter because of election data showing actual effectiveness in past elections, as well as the obvious disutility of an amorphous "higher than majority CVAP" standard, the District Court converts these conclusions into a holding on proportionality. In its view, the denominator in determining proportionality is simply whatever number of districts the court assumes could be drawn as effective. Finally, the court concludes that this proportionality holding controls the outcome even though the court agrees that "Plaintiffs have established racially polarized voting and a political, social, and economic legacy of discrimination." *Session*, 298 F. Supp. 2d at 492, J.S. App. at 76.

This bootstrapped logic, in which tenuous and unsupported conclusions about prong one under *Thornburg v.*

Gingles become the basis for a claim's failure – through the vehicle of proportionality under the "totality of the circumstances" inquiry – scrambles this Court's well-developed method for evaluating section 2 claims. Although the State seeks to portray the District Court's decision as resting on factual findings, in fact the court relied on erroneous legal determinations that subvert this Court's precedent. In effect, the District Court converts proportionality into a vehicle for unguided judicial discretion – a safe harbor of subjective and unknowable dimension.

CONCLUSION

Absent guidance from this Court, the Texas example of dismantling a minority opportunity district whenever minority political support creates a threat to an incumbent's political survival could become ubiquitous, effectively permitting a dramatic diminution in the protection provided by the Voting Rights Act to minority voters seeking to exercise political power. The Court should deny the State's motion to affirm.

Respectfully submitted,

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